

86-2067

Supreme Court, U.S.  
FILED

MAY 12 1987

JOSEPH F. SPANIOLO, JR.  
CLERK

No. \_\_\_\_\_

In The  
**Supreme Court Of The United States**  
OCTOBER TERM, 1987

BOB SCHWARTZ, *Petitioner,*

*v.*

CITY OF GRAND PRAIRIE, TEXAS AND  
STATE OF TEXAS

**PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF TEXAS**

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25914



## QUESTIONS PRESENTED

1. Whether City and/or State governments are immune from damages for a "freeze" ordinance banning any development, zoning, platting, or issuance of building permits as to selected parcels of land in a proposed future highway corridor.
2. Whether such "temporary" ordinance is a taking within the preview of the Fifth and Fourteenth Amendments.
3. Whether Petitioner is entitled to a trial for damages for diminution of value of his subject property and his loss of use of same as a result of such a "freeze" ordinance.
4. Whether Petitioner should have to pay property taxes on property affected by a "freeze" ordinance.

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**PETITION FOR WRIT OF CERTIORARI TO  
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\_\_\_\_\_  
TIMOTHY W. SORENSON and JERRY D. BROWN-  
LOW, on behalf of BOB SCHWARTZ, petition for a Writ of  
Certiorari to review the Judgment of the Supreme Court of  
Texas in this case.

**OPINIONS BELOW**

The Supreme Court of Texas refused certiorari and over-  
ruled Petitioner's Motion for Rehearing (Appendix B). The  
opinion of the Court of Appeals, Fifth District of Texas at  
Dallas affirmed the Judgment of the trial Court which held  
against Petitioner (Appendix C) in an unpublished opinion.

**JURISDICTION**

The final Judgment of the Supreme Court of Texas over-  
ruling Petitioner's Motion for Rehearing of Petitioner's  
Application for Writ of Error was entered February 11,  
1987. The jurisdiction of this Court is involved under 28  
U.S.C. 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation."

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws . . ."

3. The State of Texas Statutes, Article 1011a., Grant of power for zoning, Vernon's Texas Statutes provides in relevant part:

"For the purpose of promoting health, safety, morals, and for the protection and preservation of places and areas of historical, cultural, or architectural importance and significance, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings, and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purpose; and, in the case of designated places and areas of historic, cultural, or architectural importance and significance, to regulate and restrict the construction, alteration, reconstruction, or razing of buildings and other structures.



4. The State of Texas Statutes, Article 1011b., Districts, Vernon's Texas Statutes provides in relevant part:

"For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this Act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts."

5. The State of Texas Statutes, Article 1011g., Board of adjustment, Vernon's Texas Statutes provides in relevant part:

"(a) . . . that the said Board of Adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.

"(g) The Board of Adjustment shall have the following powers:

"(2) To hear and decide special exceptions to the terms of the ordinance upon which such Board is required to pass under such ordinance.

"(3) To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

6. The City of Grand Prairie Ordinance No. 3363 provides in relevant part:

"AN ORDINANCE RECOGNIZING THE RIGHT OF WAY OF TEXAS STATE HIGHWAY 161; PROHIBITING DEVELOPMENT WITHIN THE CORRIDOR OF SAID HIGHWAY; TO BECOME EFFECTIVE UPON ITS PASSAGE AND APPROVAL

" . . . WHEREAS, the City has received an official map of the right of way of Texas State Highway 161 dated June 1979, revised April 1980 and June 1981 and entitled 'S.H. 161 From I.H. 20 to S.H. 114 SCHEMATIC', which map is on file in the office of the Director of Public Works of the City; and

"WHEREAS, the State of Texas has indicated to the City that it will begin acquiring the right of way shown on said map; and

"WHEREAS, the right of way should be protected from encroachments and obstructions; and

"WHEREAS, the construction of Texas State Highway 161 will be beneficial to the growth, development, commerce, and travel of the citizens of Grand Prairie, Texas."

"NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

"SECTION 1: THAT there shall be allowed no development, zoning, platting nor the issuance of building permits within the area designated on the Schematic Map referred to above as the right of way of Texas State Highway 161.

". . . PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS, this 3rd day of August, 1982 . . . " (For full text, see Appendix D.)

7. The City of Grand Prairie Ordinance No. 3424 provides in relevant part (amending Section 1 of Ordinance No. 3363 above):

*"Section 1: . . . [T]hat building permits may be granted for interior remodeling of existing structures not to exceed 50% of the value of the building . . .*

*" . . . PASSED AND APPROVED . . . this 11th day of January, 1983." (For full text, see Appendix E.)*

8. The City of Grand Prairie Ordinance No. 3629 provides in relevant part:

*"Ordinances No. 3363 and 3424 shall be of no force and effect and the prohibitions thereof shall cease December 31, 1984.*

*" . . . PASSED AND APPROVED . . . this 26th day of June, 1984." (For full text, see Appendix F.)*

## STATEMENT

When the original suit was filed, Petitioner, a developer, owned two vacant parcels of land in Grand Prairie, Texas. The smaller one was acquired in 1972 (the "Dalworth property") and the larger one (an 8-acre tract on the north side of town, the "19th Street property") was acquired in 1978. Both parcels of land lay predominantly in the proposed State Highway 161 (SH 161) corridor.

On August 3, 1982, Respondent, CITY OF GRAND PRAIRIE, TEXAS, sometimes hereinafter referred to as "CITY", passed Ordinance No. 3363 prohibiting development<sup>1</sup> of real property within the State Highway 161

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<sup>1</sup>Prohibited development, zoning, or platting for seventeen months. After the fifth month, CITY OF GRAND PRAIRIE, TEXAS, did by Ordinance No. 3629 allow interior remodeling of existing buildings up to 50% valuation of said building. Ordinance No. 3629 did not apply to Petitioner, since his property was vacant.

(SH 161) corridor. Said ordinance was in effect until December 31, 1984,<sup>2</sup> for two years, five months. Although the additional Respondent, STATE OF TEXAS, designated SH 161 on April 19, 1971, as of the day of the writing of this petition, construction has not begun on SH 161.

Petitioner applied for and was denied a building permit on his Dalworth property during the time of the moratorium established by the CITY.<sup>3</sup>

At this point, Petitioner felt it futile to appeal same or apply for building permit(s) on his 19th Street property since the CITY's ordinance was totally prohibitory as to vacant property. Petitioner, on March 14, 1984, sought redress in the appropriate Texas State Court seeking declaratory relief, injunction, and damages. In the original petition in the State Court, the Petitioner alleged that the ordinances were violative of the U.S. Constitution. It was only after the filing of Petitioner's suit that the CITY passed Ordinance No. 3629 which terminated the building and development ban as of December 31, 1984.

On June 10, 1984, (during the moratorium), Petitioner and CITY both filed Motions for Summary Judgment.

Thereafter, the trial Court granted Respondent CITY's Motion for Summary Judgment<sup>4</sup> stating that it is the [trial] Court's "... opinion that by granting Summary Judgment in favor of the CITY OF GRAND PRAIRIE, TEXAS, [Petitioner's] claims against the STATE are moot." A succession of appeals followed until on February 11, 1987,

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<sup>2</sup>CITY OF GRAND PRAIRIE, TEXAS, lifted the prohibitory ordinances effective December 31, 1984.

<sup>3</sup>Petitioner applied for a building permit on his Dalworth property in December, 1983, and it was denied January 30, 1984.

<sup>4</sup>Signed by the trial Court on September 12, 1985.

the Supreme Court of Texas finally overruled Petitioner's Motion for Rehearing.

Petitioner alleges that, by operation of the ordinances banning his use of his property, for whatever period of time, he has been deprived of property without due process of law by State Action, his property has been taken for public use without compensation, and he has been deprived of equal protection under the law.<sup>5</sup>

Petitioner urges the damage issue remains for the taking during the moratorium of two years, five months<sup>6</sup> on Petitioner's property either as to lost rental, diminution of value of the property by reason of the wrongful ordinance, and/or for the taxes Petitioner paid during the moratorium.<sup>7</sup>

### REASONS FOR GRANTING THE PETITION

This case presents the important question whether it is permissible for local and/or state governments, solely for the purpose of preventing encroachment on right of way for future thoroughfares, to ban and prohibit, even temporarily, use of an individual's real property without compensation. (A mere reading of the main CITY ordinance here attacked establishes that its sole purpose was to ban use of property within the proposed right of way for a state highway.)

The operation of the ordinances in question has a two-fold effect on Petitioner. The ordinances:

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<sup>5</sup>United States Constitution Fifth and Fourteenth Amendments. The property owners along SH 161 corridor were discriminated against, since they were the only ones affected by the zoning.

<sup>6</sup>At five months into the seventeen-month prohibitory moratorium, Petitioner could improve any existing building up to 50% valuation, but since Petitioner had no buildings, this "savings clause" did not apply to him.

<sup>7</sup>Petitioner would assert that this moratorium prohibition effectively precluded Petitioner's alienation of his property during the seventeen-month "freeze" since he could not sell it during that period. (The government had rented it, if you will.)

(1) Affect a taking of Petitioner's property without compensation and without due process of law; and

(2) Deprive Petitioner of equal protection of law by imposing on him a special burden not shared by others in the CITY who benefit from the proposed thoroughfare.

The Court of Appeals, Fifth District of Texas at Dallas, in an unpublished opinion, sustained the trial court and was affirmed by the Supreme Court of Texas.<sup>8</sup> The Appellate Court sidestepped the damage issue stating Petitioner lacked standing to sue. The Court of Appeals stated:

"Schwartz never requested a building permit or a variance from the Grand Prairie Board of Adjustment for his '19th street property.' Schwartz did apply for a building permit for his 'Dalworth property,' but the permit was denied by a city plan review analyst. Schwartz did not, however, appeal his denial to the Board of Adjustment, nor did he request a variance for his property.

"Schwartz did not obtain a final decision from the City of Grand Prairie regarding the application of these ordinances to his properties. Therefore, we hold that his suit is not ripe, and that he lacks standing to bring suit."

Citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, L.Ed.2d 126 (1985). The Supreme Court of Texas affirmed that decision by overruling Petitioner's Motion for Rehearing.

In *Williamson*, the owner began development of a 676-acre residential subdivision in 1973. By 1979, the developer had

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<sup>8</sup>The Supreme Court of Texas overruled Petitioner's Application for Writ of Error and Motion for Rehearing (of Application for Writ of Error) without comment.

spent millions on a golf course and completed 212 living units, all as approved by the Commission. Approximately 500 more dwelling units were contemplated under the original approved plat of 1973. In 1977, the Commission reduced the allowable density cutting out almost 200 dwelling units by a zoning change and in 1979 applied that zoning change to developer, thereby reducing by almost 200 units the total number of dwelling units developer would be allowed. Developer's successor in interest sued and the United States Supreme Court granted certiorari.

The United States Supreme Court held developer's question premature, stating "[Developer] has not yet obtained a final decision regarding the application of the zoning ordinance. . ."

In *Williamson*, supra, on Page 3117, the Court cites *Hodel v. Virginia Surface Mining & Recreation Assn., Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), to the effect that developer should seek either a variance from or a waiver to the restrictions. The *Hodel* Court said if the developers pursued administrative relief, a mutually acceptable solution might be reached.

In this case, there was no possible mutually acceptable solution. Government had "frozen" Petitioner's land by "prohibiting development" and stating "there shall be allowed no development".

Petitioner asserts there can be no variance or waiver of an "absolute prohibition".

Unlike *Williamson*, Petitioner had no improvements or buildings of any kind on the properties when the ordinances were passed. *Williamson* was a question of degree; in Petitioner's case, there was no room for compromise. The ban was absolute.



*Williamson*, supra, was allowing developer some building, just not as much or as dense as developer there wanted. Here the property was totally frozen as to any economic use or development of reasonable investment-backed expectations. There was a refusal to permit any development, denying developer an economically viable use of the land.

In *Hodel*, supra, the government was allowing some development of the general nature that developers requested. In *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 656 L.Ed 100 (1980), the government allowed some development. In *Williamson*, the commission allowed some development.

Here the CITY OF GRAND PRAIRIE, TEXAS, was prohibiting *all* development.

Again in *Agins*, this Court states at Page 2567:

"Our cases uniformly reflect an insistence on knowing the *nature and extent of permitted development* before adjudicating the constitutionality of the regulations that purport to limit it." (Emphasis ours.)

In this case, "no development, zoning, platting, nor issuance of building permits"<sup>9</sup> was permitted under the very terms of the ordinances attacked.

In *MacDonald, Sommer & Frates v. Yolo County*, \_\_\_\_\_, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986), this Court cited the California Court of Appeals with approval stating on Page 2565:

"Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] *full extent* he might desire or be charged with an unconstitutional taking of the property. Here as in *Agins*, the refusal of

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<sup>9</sup>Ordinance No. 3363; emphasis ours.



the Defendants to permit the *intensive* development desired by the landowner does not preclude less intensive, but still valuable development." (Emphasis ours.)

The important question presented in *MacDonald*, *supra*, though never reached, was "whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings . . ." (Pages 2565-2566)

We pray this question be reached here. The focal question is not how the government will apply the regulation in question to the particular land in question, but the reach of the ordinance as expressed in its own terms. There can be no dissention that the ordinance is an absolute fiat against any development on its face.

*MacDonald* states on Page 2566 that a regulatory taking has two components, first Petitioner must establish that the regulation has "taken his property", and second the "proffered compensation is not 'just' "; that an essential prerequisite to the assertion of a regulatory taking claim is:

" . . . a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes".

Here the regulation goes all the way. It takes everything for a period determined solely by the government with no compensation. If left standing, the CITY could re-enact this ordinance in the face of any attempted development and could, in fact, protect right of way for other thoroughfares in this unconstitutional manner.

The *MacDonald* Court points out, citing Justice Holmes in his opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at

460, 43 S.Ct. at 160, "this is a question of degree — and therefore cannot be disposed of by general propositions." "To this day we have no 'set formula to determine where regulation ends . . .'"

It is advanced by Petitioner that a permissible "regulation" ended the day the government's ordinance became effective, and that then a taking commenced mandatory monetary remedies to Petitioner. Using the ad hoc inquiries of the *MacDonald* Court, the economic impact of the regulation was total, and its interference with reasonable investment-backed expectations was devastating.

During the effective date of the regulation, no beneficial use for the property existed. The regulation had the same effect as an appropriation of the property through eminent domain or physical possession. (They didn't even offer to mow the grass.)

The effect of the government's application of the regulation to the value of Petitioner's property was total diminution of value. The final decision as to how the regulation would be applied to Petitioner's property was decided by the CITY OF GRAND PRAIRIE, TEXAS, City Council on August 3, 1982, when it decided to prohibit "all development" within the SH 161 corridor for an indeterminate period of time.

The normal flexibility found in the *Hodel* and *Williamson* cases was starkly absent here. No adjustments were even contemplated. The regulation has "gone too far", and proffered no compensation, allowing no reasonable use of Petitioner's land.

As *MacDonald* says on Page 2567: "Our cases uniformly reflect an insistence on knowing the nature and extent of

permitted development before adjudicating the constitutionality of the regulations that purport to limit it."

The City fathers of the CITY OF GRAND PRAIRIE, TEXAS, made it abundantly clear that as to the nature and extent of development, none was to be allowed.

The *MacDonald* Court says on Page 2568 that:

"the records in those cases<sup>10</sup> left us uncertain whether the property at issue had in fact been taken. Likewise, in this case, the holdings of both courts below leave open the possibility that some development will be permitted . . ."

Here the CITY OF GRAND PRAIRIE, TEXAS, left no doubt that no development was to take place.

### EXHAUSTION OF ADMINISTRATIVE REMEDIES

The Texas Courts erroneously hold that the Petitioner has no standing to sue by reason of the fact that he had failed to exhaust his administrative remedies by not applying for a building permit in the face of the ordinance as to one property, and by not applying for some sort of variance or exception from the terms of the ordinance as to both properties. This position begs the question of the unconstitutionality of the ordinances in the first instance. It should not be incumbent on a land owner to go through the empty ceremony of applying for a variance or exception to an *absolute* ban when the absolute ban by its very mandate would not allow same. Based on the authorities hereinbefore cited, it is conclusive that the CITY exceeded any authority it might claim under the police power to regulate the use of Petitioner's property, particularly in view of the obvious

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<sup>10</sup>*Agins*, supra, *Williamson*, supra, and *San Diego Gas & Electric v. San Diego*, 450 U.S. 621, 101 S. Ct. 1287, 67 L.Ed.2d 551 (1981)

intent of the ordinance. The ordinances in question are simply a blatant attempt by the CITY to "rig the market" (a phrase used by the Texas Supreme Court in another case) in favor of the public in detriment to the rights of the individual land owner.

Article 1011a., Vernon's Texas Civil Statutes, contains the grant of power of zoning for the CITY OF GRAND PRAIRIE. It provides that "För the purpose of promoting health, safety, morals," the CITY is empowered to "regulate and restrict the height, number of stories, and size of buildings, and other structures, the percentage of a lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purpose;". Despite the wording of the ordinance here in question, its purpose was not to promote health, safety, and morals of the citizens, but was obviously for the purpose of protecting the right of way from encroachment. Neither was the ordinance designed to "regulate and restrict" land usage, but emphatically ban any use.

Article 1011b., Vernon's Texas Civil Statutes, permits the local legislative body to divide the city into districts for the purposes of carrying out the Act. There is no mention in the offensive ordinance of any sort of zoning district created by it, nor was it an amendment to the comprehensive zoning ordinance. To the contrary, it was a special ordinance announcing the legislative intent of the CITY to protect the right of way from encroachment while waiting for the STATE, at its leisure, to commence acquisition or condemnation proceedings. These ordinances simply were not zoning or regulatory ordinances in the context considered by the Court in all of the cases herein cited.

Article 1011g., Vernon's Texas Civil Statutes, establishes a Board of Adjustments and provides that it "may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained." It further authorizes the Board of Adjustments to authorize a variance from the terms of the ordinance, "so that the spirit of the ordinance shall be observed and substantial justice done." There is absolutely no authority granted by statute or under case law in Texas authorizing the Board of Adjustments to permit zoning, development, or building permits in the face of an ordinance duly enacted by the legislative body absolutely prohibiting or banning same.

Under no theory of law can the Board of Adjustments be empowered to make judicial findings as to the constitutionality of an ordinance enacted by the legislative body of the CITY. To imply that any Board of Adjustments would have such authority is to oust the Courts of jurisdiction in matters such as this, contrary to public policy.

To require the Petitioner to undergo the cumbersome process of appeal to the Board of Adjustments, and subsequent appeal to the District Court in response to an unconstitutional ordinance would be unreasonable. It would further delay justice which frequently results in no justice at all. (In one Texas case, cited by Petitioner in the State Court, a developer was "stalled" for approximately twenty-four (24) months trying to get a final permit for his development. This conduct was declared unconstitutional by the Texas Supreme Court in *City of Austin v. Teague*, 570 S.W.2d 389 (Tex 1978).

Based on the authorities hereinbefore cited, it is the Petitioner's contention that the ordinances in question were, at their inception, void and a nullity. Therefore, the Board of Adjustments had nothing to which it could grant a variance or exception and, not being a judicial body or clothed with any judicial authority, had no power to declare the ordinance void by granting any zoning, development, or building permit.

In summary, the government has transparently used its zoning powers to take Petitioner's property in this case for two years, five months. For said period of time, the property was virtually useless. Any damages directly occasioned by the ordinances and for the chilling effect of same should be determined by a Court and jury. The government's final definitive position in applying the regulation to Petitioner's empty land was *no* development. The government continued to assess taxes which Petitioner did pay. On the facts, Petitioner states there has been a taking without compensation.

## CONCLUSION

(1) The Petitioner was deprived of the use of his property without due process of law and without compensation by reason of the operation of the ordinances of the CITY OF GRAND PRAIRIE, TEXAS, herein referred to.

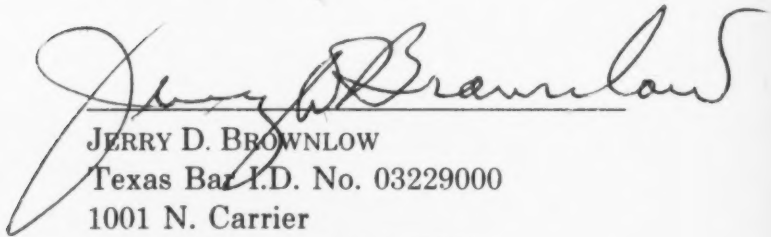
(2) Petitioner was denied equal protection of law by reason of the operation of the ordinances of the CITY OF GRAND PRAIRIE, TEXAS, herein referred to in that Petitioner was deprived of the benefits of his property for the use and benefit of all of the citizens of the CITY OF GRAND PRAIRIE, TEXAS, as a whole.

For the foregoing reasons, this Writ of Certiorari should be granted.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

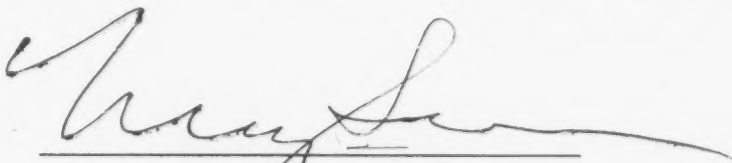
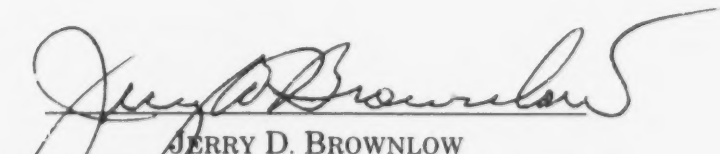
This is to certify that three copies of the foregoing Petition for a Writ of Certiorari were this date mailed to all other counsel of record in this case as shown below in the manner set beside each respective name:

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DATED this 19th day of June 1987.

  
TIMOTHY W. SORENSON  
JERRY D. BROWNLOW



A-1

**SUPREME COURT OF TEXAS**

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September 10, 1986

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A-2

RE: Case No. C5374

STYLE: BOB SCHWARTZ  
v. CITY OF GRAND PRAIRIE *et al.*

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

MARY M. WAKEFIELD, Clerk

By /s/ BLANCA E. MORIN

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Deputy

B-1

**SUPREME COURT OF TEXAS**

P.O. Box 12248  
Supreme Court Building  
Austin, Texas 78711  
Mary M. Wakefield, Clerk

February 11, 1987

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Grand Prairie TX 75050

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P.O. Box 11  
Grand Prairie TX 75053

B-2

RE: Case No. C5374

STYLE: BOB SCHWARTZ  
v. CITY OF GRAND PRAIRIE *et al.*

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ BLANCA E. MORIN  
Deputy

C-1

**COURT OF APPEALS  
FIFTH DISTRICT OF TEXAS  
AT DALLAS**

BOB SCHWARTZ,

*Appellant,*

v.

NO. 05-85-01155-CV

THE CITY OF GRAND PRAIRIE and  
THE STATE OF TEXAS,  
*Appellees .*

**JUDGMENT**

In accordance with this Court's opinion of March 13, 1986, the judgment of the trial court is **AFFIRMED**. It is **ORDERED** that appellees, the City of Grand Prairie and the State of Texas recover their costs of this appeal from appellant Bob Schwartz.

March 13, 1986.

/s/ PATRICK C. GUILLOT

PATRICK C. GUILLOT

*Justice*

**COURT OF APPEALS  
FIFTH DISTRICT OF TEXAS  
AT DALLAS**

NO. 058501155CV

BOB SCHWARTZ,

FROM A DISTRICT COURT

*Appellant,*

v.

THE CITY OF GRAND PRAIRIE and  
THE STATE OF TEXAS,

*Appellees.*

OF DALLAS COUNTY, TEXAS

**BEFORE JUSTICES STEPHENS,  
GUILLOT AND STEWART**

**OPINION BY JUSTICE GUILLOT  
MARCH 13, 1986**

Appellant, Bob Schwartz, appeals from a summary judgment in favor of the City of Grand Prairie and the State of Texas, appellees. For the reasons below, we affirm the judgment of the trial court.

In the trial court, Schwartz sought a declaratory judgment and injunctive relief, contending that ordinances 3363 and 3424 of the City of Grand Prairie were confiscatory, arbitrary, and a denial of due process rights as applied to Schwartz's two parcels of land. These ordinances limited development along a strip of land known as the State Highway 161 corridor. (These ordinances have since been repealed). Schwartz also sought damage recovery for the taking of his property rights while these ordinances were in force.

Schwartz contends on appeal that the trial court erred in granting summary judgment on his constitutional claims and erred in failing to address the damage issue. We need not address Schwartz's points of error because we hold that Schwartz lacks standing to sue.

Schwartz never requested a building permit or a variance from the Grand Prairie Board of Adjustments for his "19th Street property." Schwartz did apply for a building permit for his "Dalworth property," but the permit was denied by a city plan review analyst. Schwartz did not, however, appeal this denial to the Board of Adjustment, nor did he request a variance for his property.

Schwartz did not obtain a final decision from the City of Grand Prairie regarding the application of these ordinances to his properties. Therefore, we hold that his suit is not ripe, and that he lacks standing to bring suit. See, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S.Ct. 3108, 3117 (1985); and *Currey v. Kimple*, 577 S.W.2d 508, 513 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.).

We affirm the judgment of the trial court.

/s/ PATRICK C. GUILLOT

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PATRICK C. GUILLOT

*Justice*

DO NOT PUBLISH  
TEX. R. CIV. P. 452.





**ORDINANCE NO. 3363**

**AN ORDINANCE RECOGNIZING THE RIGHT OF WAY OF TEXAS STATE HIGHWAY 161; PROHIBITING DEVELOPMENT WITHIN THE CORRIDOR OF SAID HIGHWAY; TO BECOME EFFECTIVE UPON ITS PASSAGE AND APPROVAL.**

WHEREAS, The Texas Department of Highways and Public Transportation has publicly announced the project to construct Texas State Highway 161 through the City of Grand Prairie; and

WHEREAS, public hearings were conducted related to the location of the right of way of said Highway 161 on January 15, 1975, and environmental impact studies have been made and completed; and

WHEREAS, the City has reviewed an official map of the right of way of Texas State Highway 161 dated June 1979, revised April 1980 and June 1981 and entitled "S.H. 161 From I.H. 20 to S.H. 114 — SCHEMATIC", which map is on file in the office of the Director of Public Works of the City; and

WHEREAS, the State of Texas has indicated to the City that it will begin acquiring the right of way shown on said map; and

WHEREAS, the right of way should be protected from encroachments and obstructions; and

WHEREAS, the construction of Texas State Highway 161 will be beneficial to the growth, development, commerce and travel of the citizens of Grand Prairie, Texas.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:**

**SECTION 1:** THAT there shall be allowed no development, zoning, platting nor the issuance of building permits within the area designated on the Schematic Map referred to above as the right of way of Texas State Highway 161.

**SECTION 2:** THAT a copy of this ordinance shall be maintained in the Office of the City Secretary, Planning Department, Building Inspection Department, and Public Works Department for public information and review.

**SECTION 3:** THAT this ordinance shall be in full force and effect upon passage and approval.

**PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS, this 3rd day of August, 1982.**


/s/ ANNE GRESHAM

MAYOR,  
CITY OF GRAND PRAIRIE, TEXAS

**ATTEST:**

/s/ SUE SHAWVER

City Secretary



**ORDINANCE NO. 3424**

AN ORDINANCE AMENDING ORDINANCE NUMBER 3363; TO BECOME EFFECTIVE UPON ITS PASSAGE AND APPROVAL.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

*SECTION 1:* THAT Section 1 of Ordinance No. 3363 shall be amended to read in its entirety as follows:

*"Section 1:* THAT there shall be allowed no development, zoning, platting nor the issuance of building permits within the area designated on the Schematic Map referred to above as the right of way of Texas State Highway 161 except that building permits may be granted for interior remodeling of existing structures not to exceed 50% of the value of the building, fences, above ground swimming pools, replacement of equipment in existence as of the date of this ordinance and temporary, portable buildings not over 200 square feet."

*SECTION 2:* THAT this Ordinance shall be in full force and effect upon its passage and approval.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS, this 11th day of January, 1983.

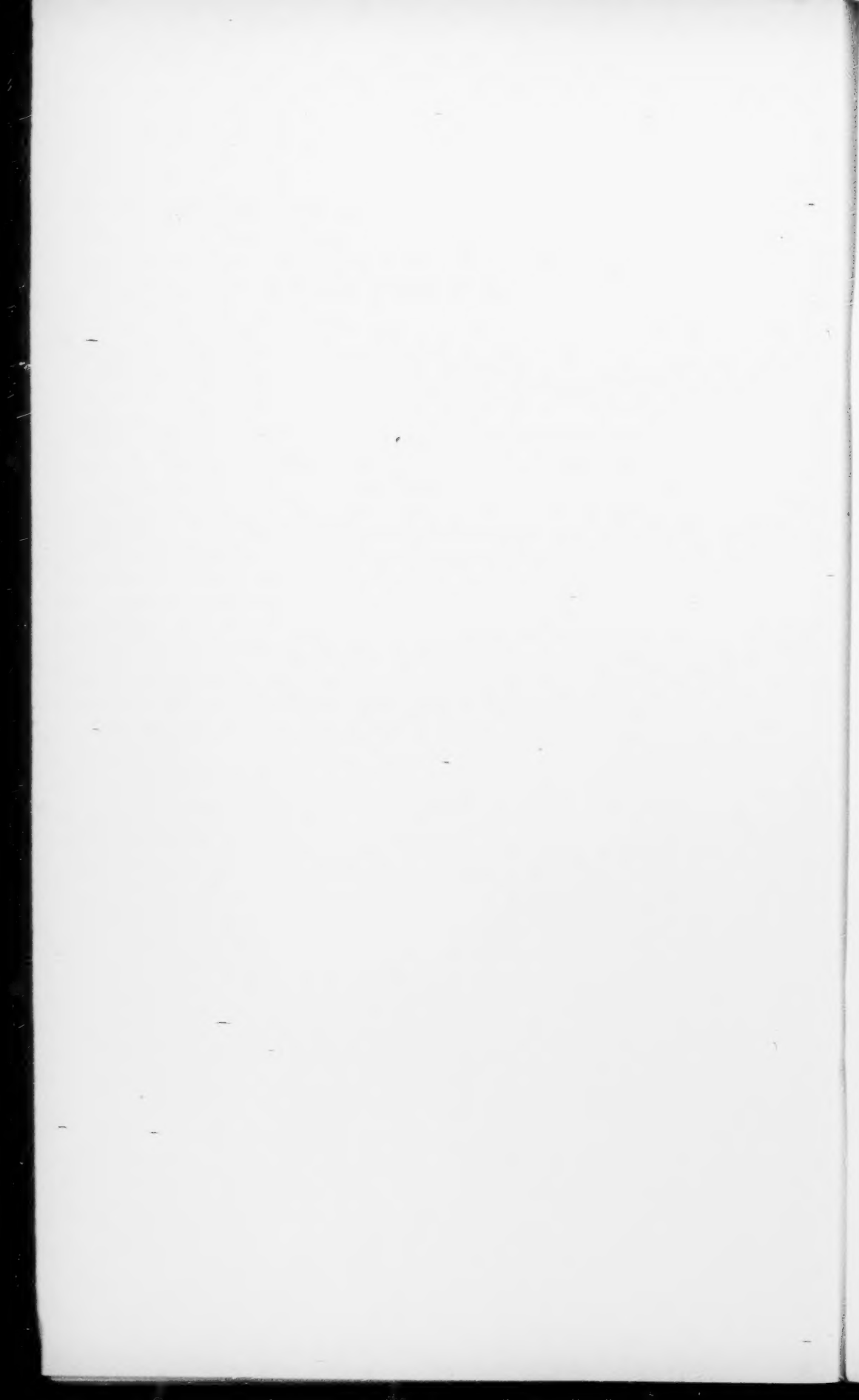
/s/ ANNE GRESHAM

MAYOR,  
CITY OF GRAND PRAIRIE, TEXAS

ATTEST:

/s/ SUE SHAWVER

City Secretary



**ORDINANCE NO. 3629**

AN ORDINANCE AMENDING ORDINANCE NUMBERS 3363 AND 3424 PROHIBITING DEVELOPMENT WITHIN THE CORRIDOR OF TEXAS STATE HIGHWAY 161; TO BECOME EFFECTIVE UPON ITS PASSAGE AND APPROVAL.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS:

*SECTION 1:* THAT Ordinance Numbers 3363 and 3424 prohibiting development within the corridor of Texas State Highway 161 shall be amended by adding a termination date as follows:

Ordinance Numbers 3363 and 3424 shall be of no force and effect and the prohibitions thereof shall cease December 31, 1984.

*SECTION 2:* THAT this Ordinance shall be in full force and effect upon its passage and approval.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF GRAND PRAIRIE, TEXAS, this the 26th day of June, 1984.

/s/ J V DEBO III

MAYOR,  
CITY OF GRAND PRAIRIE, TEXAS

ATTEST:

/s/ SUE SHAWVER

City Secretary